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No. 73-664

In the Supreme Court of the United States

OCTOBER TERM, 1973

RAY BAILLIE TRASH HAULING, INC., ET AL., PETITIONERS

v.

THOMAS S. KLEPPE, ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	13

CITATIONS

Cases:	
DeFunis v. *Odeguard*, No. 73-235, certiorari granted, November 19, 1973	10
Flast v. *Cohen*, 392 U.S. 83	8
Laird v. *Tatum*, 408 U.S. 1	8
Linda R. S. v. *Richard D.*, 411 U.S. 614	8
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163	8
Sierra Club v. *Morton*, 405 U.S. 727	8
Statutes and regulations and directive:	
Small Business Act, 72 Stat. 384, as amended, 15 U.S.C. 631, *et seq.*:	
Section 2(a), 15 U.S.C. 631(a)	5
Section 3, 15 U.S.C. 632	2
Section 8(a), 15 U.S.C. 637(a)	2, 4, 5, 6, 7, 8, 9
Section 8(b)(11), 15 U.S.C. 637(b)(11)	3
13 C.F.R. 124.8-1	2, 3, 4
13 C.F.R. 124.8-1(b)	3
13 C.F.R. 124.8-1(c)	3, 4
13 C.F.R. 124.8-1(d)	4
13 C.F.R. 124.8-2	2
SBA National Directive 801	3

529-740—74——1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3(a)-30(a)) is reported at 477 F. 2d 696. The opinion of the district court (Pet. App. 59(a)-75(a)) is reported at 334 F. Supp. 194.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3(a)) was entered April 18, 1973. A timely petition for rehearing was denied June 18, 1973 (Pet. App. 1(a)-2(a)). By order of September 7, 1973, Mr. Justice Rehnquist extended the time for filing a petition

for a writ of certiorari to and including October 17, 1973, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Small Business Administration's program of assistance to small business concerns owned by socially or economically disadvantaged persons is authorized by statute.

2. Whether petitioners, who do not claim to be socially or economically disadvantaged and have not applied for assistance under the program, have standing to challenge alleged discrimination in the administration of that program.

STATUTE AND REGULATIONS INVOLVED

Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), the implementing regulations, 13 C.F.R. 124.8–1 and 124.8–2, and the Small Business Administration National Directive 801 are set forth in pertinent part in the Appendix, *infra*.

STATEMENT

This suit involves a challenge to the validity of the Small Business Administration's "Section 8(a)" program, which is designed to assist small business concerns[1] owned by "socially or economically disadvan-

[1] Section 3 of the Small Business Act, 15 U.S.C. 632, defines "small business concern" as a business which is independently owned and operated, is not dominant in its field of operation, and meets administratively prescribed criteria relating to number of employees, dollar volume of business, and other factors relating to size.

taged persons" to obtain government procurement contracts, thus enabling them "to become self-sufficient, viable businesses capable of competing effectively in the marketplace." 13 C.F.R. 124.8–1(b) and (c). The category of such disadvantaged persons "often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts." 13 C.F.R. 124.8–1 (c); SBA National Directive 801. Specifically, "the class of socially or economically disadvantaged is not limited to members of minority races." SBA National Directive 801.

Petitioners and All American Waste, Inc., the non-government defendant below, are small business concerns engaged in the business of refuse hauling. Petitioners are owned and operated by whites; the principal shareholders of All American Waste are blacks. The dispute in this case arises out of the award to All American Waste of a contract for refuse removal from the Homestead, Florida, Air Force base. The government defendants are the Administrator of the SBA, the Secretary of the Air Force, and an Army contracting officer.

1. In 1968 and 1969, the Air Force and the Small Business Administration, acting pursuant to Section 8(b)(11) of the Small Business Act, 15 U.S.C. 637(b)(11), "set aside" the Homestead refuse removal contract for award through advertising and competitive bidding limited to small business concerns. Petitioner Jones' company was the successful bidder at a price of $42,245 in 1968, and petitioner Santo's company at a price of $49,116 in 1969. Commencing with

the termination of Santo's contract for nonperformance in 1970, the Air Force agreed to let the contract under the program established under Section 8(a) of the Small Business Act, 15 U.S.C. 637(a).[2]

That provision authorizes the SBA to enter into procurement contracts with other federal agencies and arrange for performance of those contracts by "negotiating or otherwise letting" subcontracts to small business concerns. By regulations first promulgated in 1968, the SBA directed that Section 8(a) procedures be utilized to obtain subcontracts for small business concerns owned by socially or economically disadvantaged persons, in order to help such concerns become viable businesses capable of competing effectively in the marketplace. 13 C.F.R. 124.8–1. This 8(a) program is invoked only where there is no reasonable possibility of an award being made to a disadvantaged contractor under normal competitive procedures and no other small business concerns are dependent in whole or in significant part on recurring government contracts. 13 C.F.R. 124.8–1(d).[3]

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[2] To be eligible for participation in the Section 8(a) program, "a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time." 13 C.F.R. 124.8–1(c).

[3] The policy here is consistent with the policy of the Small Business Act in general—*i.e.*, to "aid, counsel, assist, and protect * * * the interests of small-business concerns in order * * *

Pursuant to this program, the SBA secured a contract from the Air Force for the collection of refuse at Homestead for a two-year period and negotiated a one-year subcontract with All American Waste for the performance of those services at a price of $65,000.[4] The SBA was preparing to extend the subcontract for a second year when petitioners protested and demanded that the contract be let as in 1968 and 1969, *i.e.*, by competitive bidding limited to small business concerns. Petitioners did not alternatively apply for participation in the 8(a) program, nor did they claim they were eligible for consideration under the program's criteria (Pet. App. 6(a)). The SBA rejected their demand for release of the contract from the 8(a) program and subsequently executed a second subcontract with All American.

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to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government * * * be placed with small-business enterprises * * *." 15 U.S.C. 631(a).

[4] Petitioners contended that the $65,000 included a premium designed to enhance All American's competitive position against them and other similarly situated small business concerns for commercial business accounts and the district court so found (Pet. App. 61(a), 72(a), 74(a)). However, the SBA regional director filed a contrary affidavit in the district court proceeding:

"It is my information and belief and that of the Contracting Officer of Homestead that the contract price awarded to All-American ($65,000) in Fiscal Year 1971 was not excessive. According to my office records, the Air Force estimated that the contract would range from $63,000 to $67,000. The $40,116 figure which L & J Waste Service bid and was awarded was substantially lower because, in my opinion, L & J underbid the contract. This is supported by the fact that L & J was unable to meet the contract terms of the previously referenced contract." [Pet. App. 33(a), note 1.]

2. Petitioners filed this action for injunctive and declaratory relief to prevent the SBA from letting the Homestead contract under the 8(a) program. The district court held that there was no statutory authority for that program (Pet. App. 73(a)) and ordered the defendants to contract for the Homestead services by competitive bidding among the plaintiffs and other similarly situated small business concerns (Pet. App. 74(a)). Additionally, the court held that the 8(a) program, as administered, invalidly discriminated on the basis of "race, color or ethnic origin" (Pet. App. 74 (a)).

The court of appeals reversed, holding that the Small Business Act granted the SBA ample authority to operate a subcontracting program for the benefit of small business concerns owned by socially and economically disadvantaged persons, that the conduct of such a program is "rationally related to a proper government purpose" (Pet. App. 28(a)) and therefore satisfies due process, and that petitioners, having failed to apply for participation in the 8(a) program, did not have standing to challenge discrimination in the actual administration of that program.

ARGUMENT

Petitioners in this litigation have not contested the constitutional authority of the federal government to conduct programs of economic assistance to businesses owned by "socially or economically disadvantaged persons." Their quarrel is not with that eligibility criterion as such; they apparently recognize that a program based upon such a criterion, if enacted by Con-

gress and applied in a racially noninvidious manner, would pose no greater constitutional difficulty than any of the many other federal programs of economic or social welfare assistance to the relatively disadvantaged.[5]

Petitioners here contend instead (1) that there is no statutory authority for an SBA subcontracting program based upon an eligibility criterion of "socially or economically disadvantaged" and (2) that that criterion is applied by the SBA in a way which is in fact racially discriminatory. The court of appeals properly rejected the first of these contentions, in an opinion (Pet. App. 10(a)-28(a)) on which we rely for that purpose.

The court originally rejected petitioners' second contention as well, on the ground that they had failed to show that the 8(a) program was being administered in a racially discriminatory manner (see Pet. App. 52(a)-57(a)); but the court's original opinion was withdrawn *sua sponte* and in its final opinion the court held that petitioners' failure to apply for participation in the 8(a) program deprived them of standing to challenge racial discrimination in its administration.[6]

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[5] Indeed, the Small Business Act itself, which assists small businesses in order to ensure their survival in competition with larger businesses, is a prime example of economic welfare legislation.

[6] Petitioners suggest (Pet. 16) that the original opinion was withdrawn because they produced, upon petition for rehearing, an unsworn, off-the-cuff statement made by an SBA official at a public panel discussion. See Pet. App. 88(a). It seems unlikely that the court would have relied upon such a show-

The court of appeals properly determined that petitioners lacked standing to challenge alleged discrimination in the administration of the 8(a) program. To establish the personal stake necessary to confer standing, a plaintiff who challenges an administrative action must show that he was caused or threatened injury by that action. See, *e.g., Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617; *Sierra Club* v. *Morton*, 405 U.S. 727, 738; *Flast* v. *Cohen*, 392 U.S. 83, 101. Cf. *Laird* v. *Tatum*, 408 U.S. 1. Petitioners here have established no such personal stake in this litigation. Petitioners did not apply for participation in the 8(a) program and therefore could not have been injured by any alleged racial discrimination in the administration of that program. Accordingly, they lack standing here. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166–167.

Petitioners attempt to remedy their failure to apply for participation in the program by arguing that the fact that the program is administered in a racially discriminatory manner is so well established that it would have been futile for them to apply. In short, petitioners are requesting this Court to take judicial notice, for purposes of standing, of the existence of the very racial discrimination which they must prove to succeed on the merits. Whatever force this argu-

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ing, which amounted to an attempt to introduce new evidence into the record. In any event, the statement was not inconsistent with the evidence at the trial, which showed that although almost all 8(a) program subcontracts are let to minority-owned enterprises, there are also whites who are considered disadvantaged for purposes of the program and whose businesses have received subcontracts under it.

ment may have in other contexts, it does not help petitioners here.

First, it has not been established that the program is administered in a racially discriminatory manner; to the contrary, the court of appeals properly concluded in its original opinion that petitioners had failed to show discrimination.

Second, petitioners do not even contend that they would qualify for assistance under a racially noninvidious standard of "socially or economically disadvantaged." Such a contention is critical to a showing that petitioners are injured by any racial discrimination among persons who do so qualify. Petitioners' failure to allege even that they are socially or economically disadvantaged themselves encompasses a failure to allege injury from any racial discrimination in the administration of the 8(a) program, and they therefore have no standing to challenge such discrimination.

Even assuming *arguendo* that petitioners had standing to complain that the 8(a) program was administered in a racially discriminatory manner, the district court erred in finding that such discrimination was shown. The SBA demonstrated that its regulations do not define eligibility in terms of race, and that its decisions on eligibility are not made on the criterion of race or any other single criterion but on "the general pattern of an individual['s] life, his opportunities—educational, social and economic" (Pet. App. 52(a)). The agency's regional director explained that the program regulations apply "equally to mem-

bers of all races," and that "a Caucasian may be found to be socially or economically disadvantaged and thereby eligible for participation in the program" (Pet. App. 52(a)-53(a)). Moreover, the record indicates that whites have indeed participated in the program (Pet. App. 55(a)).

Petitioners, on the other hand, did not show that the racial distribution of persons participating in the program was significantly disproportionate to the racial composition of the class of persons applying for benefits. Nor was it shown that any small business concern owned by socially or economically disadvantaged whites had ever been denied participation in the program. Accordingly, petitioners failed to support their charges of racial discrimination. The district court erred under the circumstances in concluding that the program invalidly discriminates on the basis of race, color, or ethnic origin (Pet. App. 74(a)).[7]

[7] Since the 8(a) program is not operated in a way which discriminates in favor of members of racial or ethnic minorities, this case does not raise the broad constitutional issue presented by *DeFunis* v. *Odegaard*, No. 73-235, certiorari granted, November 19, 1973, and therefore this petition need not be held pending disposition of that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1974.

APPENDIX

Section 8(a) of the Small Business Act, 72 Stat. 389, as amended, 15 U.S.C. 637(a), provides:

> (a) *Procurement contracts; sub-contracts to small-business concerns.*—It shall be the duty of the Administration and it is empowered, whenever it determines such action is necessary—
>
> (1) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, or materials to the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer; and
>
> (2) to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small-business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies, or materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

13 C.F.R. 124.8–1 and 124.8–2 provide:

Section 124.8–1.

(a) *General.* Section 8(a) of the Small Business Act authorizes SBA to enter into all types of contracts (including supply, services, construction, research and development) with other Government departments and agencies and subcontract the performance of such contracts.

(b) *Purpose.* It is the policy of SBA to use such authority to assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace.

(c) *Eligibility.* To be eligible for an 8(a) subcontract, a concern must be owned or destined to be owned by socially or economically disadvantaged persons. This category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos and Aleuts. If a concern is not presently controlled by such persons, the firm having such control must execute a divestiture agreement providing for divestiture of control by the divesting company over the concern within a reasonable period of time. The existence of control is a question of fact for administrative determination under the circumstances of each case. Divestiture of at least 51 percent of the stock will create a rebuttable presumption of divestiture of control.

(d) *Procurement selection criteria.* Procurements will be selected which are determined suitable for performance by an SBA subcontractor. However, procurements will not be considered where:

(1) Public solicitation has been issued;

(2) There is a reasonable possibility of an award being made to disadvantaged contractors under normal competitive procedures, or

(3) Where small business concerns are dependent in whole or in significant part on recurring Government contracts.

Section 124.8–2.

(a) Concerns may submit applications for consideration under this program to SBA regional or district offices. Applications will include complete information regarding the concern's qualifications and capabilities to perform a contract.

(b) SBA will review procurement programs of other Government departments and agencies and identify proposed procurements suitable for performance by potential subcontractors.

(c) SBA will determine if a potential subcontractor is competent to perform a specific contract and will conduct appropriate negotiations with the other agency or department for the proposed procurement contract. Upon the request of the other agency or department, SBA will certify that the Administration is competent to perform the contract. Upon agreement as to terms, including price, SBA and the agency will enter into a prime contract using forms and provisions prescribed by statute and regulations applicable to the other Government agency. Thereafter, SBA will enter into appropriate subcontracts with the subcontractors for the performance of the prime contract.

* * * * *

(d) SBA may provide technical and management assistance to assist in the performance of the subcontracts.

SBA National Directive 801 reads in pertinent part:

* * * * *

2. *Eligibility and Policy.*—To be eligible for assistance under this program, a business must

be owned, or destined to be owned, by a person or persons deprived of the opportunity to develop and maintain a position in the competitive economy because of social or economic disadvantage. In many cases, persons in the following minority groups have been so deprived: Black Americans; American Indians; Spanish Americans; Oriental Americans; Eskimos and Aleuts. However, the class of socially or economically disadvantaged is not limited to members of minority races.

* * * * *

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